

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RANDALL L. BELL and U.S. POSTAL SERVICE,
POST OFFICE, Langhorne, PA

*Docket No. 00-2555; Submitted on the Record;
Issued October 24, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has more than a 13 percent impairment of the right lower extremity for which he received a schedule award.

The Office of Workers' Compensation Programs accepted appellant's claim for lumbosacral strain, herniated disc at L5-S1 and lumbar discectomy. On May 11, 1999 appellant filed a claim for a schedule award.

In a report dated March 3, 1999, Dr. David Weiss, appellant's treating osteopath, who examined appellant on February 25, 1999, provided the following results; the lumbar spine revealed muscle spasm and tenderness to palpitation over the posterior midline from L3-S1 and sacroiliac joint tenderness on the right; range of motion revealed forward flexion of 70 to 80 degrees, backward extension of 20 to 30 degrees, left lateral extension or 20 to 30 degrees and right lateral flexion of 25 to 30 degrees. All ranges of motion evaluations were carried out with pain at extremes. Appellant's extensor hallucis longus was five by five on the left versus four by five on the right. Appellant's sensory examination revealed a perceived sensory deficit over the L5 dermatome on the right and motor strength testing revealed a grade four by five involving the right lower extremity and five by five involving the left lower extremity. Dr. Weiss then determined, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), that appellant had a four percent impairment based on his sensory strength deficit at L5 nerve root,¹ a nine percent impairment based on motor strength deficit at L5 nerve root,² and a five percent impairment based on his motor strength deficit for right hip flexor.³

¹ A.M.A., *Guides* (4th ed. 1993), 48, Table 11; 130, Table 83.

² *Id.* at 49, Table 12; 130, Table 83.

³ *Id.* at 77, Table 39.

In a report dated July 14, 1999, the Office medical adviser stated that “FECA Bulletin 95-17 prohibits duplication of awards by using different tables. In this claim, I concur with Dr. Weiss using Table 83, page 130 for motor and sensory impairment due to L5 damage.” However, he disagreed with Dr. Weiss’ inclusion of appellant’s flexor weakness because he made “only the work-related diagnosis and states that is the reason for subjective and objective complaints. Therefore, including the hip flexor weakness would be a duplication and not a preexisting impairment to be considered in a schedule award.” He then recommended a 13 percent impairment rating based on a 4 percent impairment for L5 sensory loss and a 9 percent impairment for L5 motor loss.

By decision dated July 20, 1999, the Office awarded appellant a 13 percent permanent right leg impairment.

By letter dated August 10, 1999, appellant requested an oral hearing, which was held on February 15, 2000. The hearing representative issued a decision on April 25, 2000 affirming the Office’s July 20, 1999 decision.

The Board finds that appellant has a 17 percent impairment to his right lower extremity.

The schedule award provision of the Act⁴ and its implementing regulation⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In this case, Dr. Weiss stated that appellant had a 17 percent impairment of his right lower extremity and relied on the A.M.A., *Guides*, to support his conclusion. On the other hand, the Office medical adviser found that the tables for determining impairment of the lower extremity could not be used with Table 83,⁶ of the A.M.A., *Guides*, for the same injury. The Office medical adviser stated that FECA Bulletin 95-17 “prohibits duplication of awards by using different tables.”

The Board notes that FECA Bulletin 95-17⁷ was in effect for one year and expired on March 22, 1996. This bulletin was substantially incorporated into the FECA Procedure Manual

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ Table 83 provides for percentage ranges of lower extremity impairments based on spinal nerve root damage.

⁷ The Board has affirmed that 20 C.F.R. § 10.404 merely codifies recognition of the A.M.A., *Guides* as a uniform standard for evaluating impairment. The Board has also affirmed that the Office, in the exercise of its discretion, may find that certain tables found in the fourth edition of the A.M.A., *Guides* would, if combined, result in duplication of impairment awards. *Ronald R. Kraynak*, 52 ECAB ____ (Docket No. 00-1541, issued October 2, 2001).

at section 3-700, exhibit 4 in October 1995. This section of the procedure manual currently remains in effect.⁸ There is no basis, however, for the finding that Table 39 is incompatible with the use of Table 83. Indeed, the procedure manuals list of impairment tables that are incompatible gives no indication that Tables 39 and Table 83 are mutually exclusive.

Further Dr. Weiss assigned an impairment value pursuant to Table 39 for appellant's right hip flexor motor strength deficit, and for L5 nerve root sensory and motor deficit pursuant to Table 83. While the Office medical adviser stated that Dr. Weiss' evaluation resulted in duplicative impairment awards, the Office medical adviser did not explain why medically an L5 motor and sensory deficit loss would in fact be duplicative of a hip flexor motor strength deficit. The medical evidence does not indicate that the hip flexor motor strength deficit was in fact caused by an L5 deficit. Thus, the Office medical adviser's exclusion of Dr. Weiss' evaluation of the right hip flexor motor strength deficit must be set aside. It is noted that the Office medical adviser concurred with the balance of Dr. Weiss' evaluations that establish that appellant had a 17 percent impairment of his right lower extremity.⁹

The April 25, 2000 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for payment of an appropriate schedule award.

Dated, Washington, DC
October 24, 2001

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

⁸ The Board has affirmed that 20 C.F.R. § 10.404 merely codifies recognition of the A.M.A., *Guides* as a uniform standard for evaluating impairment. The Board has also affirmed that the Office, in the exercise of its discretion, may find that certain tables found in the fourth edition of the A.M.A., *Guides* would, if combined, result in duplication of impairment awards. *Ronald R. Kraynak, supra* note 8.

⁹ Four percent for sensory deficit right L5 nerve root; nine percent for 4/5 motor strength deficit L5 nerve root; five percent for motor strength deficit right hip flexors.

Willie T.C. Thomas, Member, concurring in part and dissenting in part:

The issue before the Board in the instant appeal is whether the Office of Workers' Compensation Programs must apply the regulations applicable to this claim effective January 4, 1999 requiring the Office of Workers' Compensation Programs to utilize the American Medical Association, *Guides to the Evaluation of Permanent Impairment*¹ in calculating appellant's schedule award.

The regulation pertinent to this claim decided by the hearing representative, Jeffrey J. Reddig, on April 25, 2000 is found at 20 C.F.R. § 10.404,² which reads as follows:

"Compensation is provided for specified periods of time for the permanent loss or loss of use of certain members, organs and functions of the body. Such loss or loss of use is known as permanent impairment. Compensation for proportionate periods of time is payable for partial loss or loss of use of each member, organ or function. [The Office] evaluates the degree of permanent impairment to schedule members. Organs and functions as defined in 5 U.S.C. § 8107 according to the standards set forth in the specified (by the Office) edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*."

The appellant herein, Randall L. Bell, submitted a five page orthopedic report by Dr. David Weiss and requested payment of a schedule award for a permanent impairment causally related to a January 4, 1994 employment injury. Dr. Weiss reported the following rating of appellant's permanent impairment on the basis of the A.M.A., *Guides*, fourth edition:

Sensory deficit right L5 nerve root -- 4 percent. Table 11, page 48, Table 83, page 130

4/5 motor strength deficit L5 nerve root (EHL) 9 percent. Table 12, page 49, Table 83, page 130

4/5 motor strength deficit right hip flexors -- 5 percent. Table 39, page 77

Combined total right lower extremity 17 percent

Dr. Weiss' March 3, 1999 medical report was referred to an Office medical adviser to ascertain whether such report was consistent with the A.M.A., *Guides*. Upon review of Dr. Weiss' report, the Office medical adviser, referred to FECA Bulletin 95-17. The foregoing bulletin references an attachment to FECA Bulletin 95-17 that contains a list of impairment tables in Chapter 3 and 4 of the 4th edition of the A.M.A., *Guides* which the attachment deemed incompatible and mutually exclusive. The instructions on the attachment notes that "Tables listed in Column I should not be used in Column II because doing so will result in duplicate measurements and

¹ Fourth Edition.

² See Federal Register/Vol. 63. No. 227/Wednesday, November 25, 1998/Rules and Regulations.

artificially high percentages of impairment.” No additional information as to the source of this attachment was disclosed. The authors of FECA Bulletins 95-17 and 96-17 were not disclosed. Nor was there any comments as to the reliability of the information contained in the attachment or whether the tables and measurements in the Guides were actually unreliable or any indication of the names of the researchers who reviewed the measurements and tables in Chapters 3 and 4 of the 4th edition of the A.M.A., *Guides* and found them lacking reliability.

The Office medical adviser stated:

“FECA Bulletin 95-17 prohibits duplication of awards by using different tables. In this claim, I concur with Dr. Weiss using Table 83, page 130 for motor and sensory impairment due to L5 damage.

“The question is whether hip flexor weakness should be included. Dr. Weiss makes only the work-related diagnosis and states that is reason for subjective and objective complaints. Therefore, including hip flexor weakness would be a duplication and not a preexisting impairment to be considered in a [schedule award].”

The Office medical adviser excluded the four percent Dr. Weiss allowed for hip flexor weakness pursuant to the duplication mandate of the attachment to FECA Bulletin 95-17.

Hearing Representative Jeffery J. Reddig did not consider that 20 C.F.R. § 10.404, effective January 4, 1999 specifically provide that the Office evaluates permanent impairment using the current specified edition of the A.M.A., *Guides*. Old 1995 and 1996 FECA Bulletins and attachments that the Office may have legitimately used prior to January 4, 1999, the effective date of the current regulation governing the decision of the hearing representative, was no longer valid and should not have been used to deny this appellant an appropriate and accurate adjudication of his schedule award claim under the fourth edition of the A.M.A., *Guides*. The hearing representative relied on the opinion of the Office medical adviser who applied FECA Bulletin 95-17 that had been superseded by the new regulations and did not request a review of Dr. Weiss’ opinion based exclusively on the 4th edition of the A.M.A., *Guides*.

The hearing representative specifically held,

“In his report, the DMA [district medical adviser] makes it clear that his impairment rating is based upon the finding of Dr. Weiss. He did not make his own findings. He identified specific findings from Dr. Weiss’ report and indicated whether a percentage of impairment was warranted based upon these findings. The DMA applied these findings to the A.M.A., *Guides* and calculated an overall rating of 13 percent of the right lower extremity. He also noted where Dr. Weiss erred in computing his impairment rating.”

The hearing representative clearly erred in accepting the medical opinion of the Office medical adviser where such opinion was based on application of expired FECA Bulletin 95-17 which had already been superseded by the new regulations, 20 C.F.R. § 10.404, effective

January 4, 1999. Section 10.404 provides that the Office evaluates permanent impairment using the current specified edition of the A.M.A., *Guides*. It is axiomatic that a stale bulletin may not supercede the rules of the Agency published in the Federal Register and the Code of Federal Regulations effective January 4, 1999.

The only medical report of record that satisfies the criteria for a schedule award under the A.M.A., *Guides* is the report of Dr. Weiss. On the dates this report was evaluated by the Office medical adviser and the date the hearing representative adjudicated the instant claim, only the A.M.A., *Guides* could be used to evaluate appellant's permanent impairment. The attachment to FECA Bulletins 95-17 has never been a part of the 4th edition of the A.M.A., *Guides*.

I specifically disagree with the Board's statement in footnote number 8 that other criteria aside from the tables actually incorporated in the A.M.A., *Guides*, 4th edition, may be utilized in calculating a schedule award pursuant to 20 C.F.R. § 10.404. Section 10.404 does not grant the Office discretion to use mutually exclusive tables.

The hearing representative erred in accepting the Office medical adviser's opinion in applying expired FECA Bulletins 95-17 in the instant claim in calculating appellant's schedule award. The hearing representative further erred in not applying 20 C.F.R. § 10.404, effective January 4, 1999 as the applicable law governing this case.

I concur only in granting appellant a 17 percent schedule award based on the medical report of Dr. Weiss.

Willie T.C. Thomas
Member